No. 47924-9-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

SHAWNEE K. LAZZARI, Appellant,

v.

FREDIA DELORES SZETO, Respondent.

BRIEF OF APPELLANT

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Assignment of Error No. 2: The trial court erred in considering declarations and evidence outside of the pleadings in hearing and deciding upon a motion brought under CR 12(c).

Issues Pertaining to Assignments of Error

1. If a party presents materials outside of the pleadings for consideration in the context of a motion to dismiss, and the trial court does not exclude them, should the motion be treated as a CR 56 motion for summary judgment? (Assignment of Error No. 1)

2. Was the doctrine of Collateral Estoppel inappropriately applied by the Court in determining that a claim (breach of contract) that was referenced but not decided upon in the context of a Petition for Anti-Harassment Order could not be brought in a subsequent action? (Assignment of Error No. 1)

3. Was there any basis for the Court's decision to dismiss Ms. Lazzari's claim for unjust enrichment? (Assignment of Error No. 1)

4. Did Ms. Lazzari state a claim upon which relief could be granted by alleging that Ms. Szeto breached the terms of the Settlement Agreement (and was unjustly enriched thereby), citing to the language of the Agreement that was breached, and identifying relevant factual allegations that established how the breach occurred? (Assignment of Error No. 1)

5. Since the Court refused to allow Plaintiff/Appellant Lazzari the time to respond under CR 56—despite evidence that the denial of due process actually prejudiced Plaintiff/Appellant in her ability to prepare and present affidavits and other evidence of her own to rebut the evidence proffered by Defendant/Respondent Szeto—should the Court have excluded the affidavits and evidence offered by Defendant/Respondent Szeto in her motion to dismiss? (Assignment of Error No. 2)

B. Statement of the Case

Shawnee Lazzari and Fredia Szeto are next-door neighbors who reside near Roy, Washington. Ms. Lazzari brought suit against Ms. Szeto on May 27, 2015 alleging breach of contract and unjust enrichment. CP 1-9 (see CP 4, Paragraph 21, to CP 5, Paragraph 24). This was the second time that Ms. Lazzari was forced to bring suit against Ms. Szeto. CP 2, Paragraph 6. The

previous suit was filed in 2012, and was brought because of various transgressions by Ms. Szeto, including trespass, nuisance, and injury to Ms. Lazzari's land. Id.

In response to the lawsuit, Ms. Szeto filed a series of retaliatory counterclaims against Ms. Lazzari. Id. at Paragraph 7. Ms. Szeto ultimately agreed to accept the nuisance value of $4,500.00 for her counterclaims, which were settled despite the ongoing pendency of Ms. Lazzari's suit against Ms. Szeto. Id. at Paragraph 8.

In exchange for the $4,500.00 settlement, Ms. Szeto agreed to be bound by a number of conditions contained in a Settlement Agreement that she alone signed before a Notary Public. Id.; see also CP 6-9. Among other things, the Settlement Agreement provided the following definition for "Claims":

> "Claims" shall encompass all claims, causes of action, or demands, known or unknown, that were brought or could have been brought by Counter Claimant against this Counter Claim Defendant resulting from, or to result from, the incident(s) alleged by Counter Claimant in the Lawsuit up until the date of execution of this Agreement by virtue of any act, omission or occurrence including, without limitation, all claims for personal injury, death, negligence, property damage, loss of use, attorney fees and/or costs, counterclaims, and cross-claims arising out of the Occurrence. "Claims" also includes in the general sense any other damages, demands, disputes, fines, expenses, liabilities, losses, obligations, or any other causes of action, known or unknown, asserted or not asserted, at law or equity, statutory or common law, state or federal, which arise out of, exist on account of, or in any way relate to the allegations in the Lawsuit.

Id. at CP 6, Section I(C). One way of restating this definition that is consistent with the language above is as follows:

> All claims, known or unknown, that were brought or could have been brought by Ms. Szeto against Ms. Lazzari up until the date of execution of the agreement by virtue of any act, omission or occurrence. 'Claims' also includes any other legal, equitable, statutory or common law disputes that in any way relate to the allegations in the counter claim.

As per the terms of the settlement, Ms. Szeto received the $4,500.00 in settlement funds after signing off on the Settlement Agreement and Release. CP 3, Paragraph 10. Ms. Lazzari's underlying suit against Ms. Szeto then proceeded to arbitration. Id. at Paragraph 11. Following arbitration, Ms. Szeto requested a trial de novo. Id.

On December 4, 2014, while Ms. Lazzari's suit was still pending against Ms. Szeto after arbitration, Ms. Szeto petitioned Pierce County Superior Court for an anti-harassment order against Ms. Lazzari. Id. at Paragraph 12. Ms. Szeto alleged, but offered scant support for, an incident that she claimed occurred on December 3, 2014 involving a verbal exchange between the two. Id. at Paragraph 13. Seeking to bolster her allegation of harassment on December 3, 2014, Ms. Szeto submitted argument and materials (including excerpted deposition testimony from a witness that was taken in the course of the lawsuit prior to settlement) referencing claims that had been resolved in the Settlement Agreement of June 23, 2014. Id. at Paragraphs 14-16. Ms.

Szeto's petition was granted, and Ms. Lazzari moved for reconsideration, arguing that Ms. Szeto had agreed that any and all perceived transgressions predating the Settlement Agreement were supposed to be permanently resolved. CP 17, at Paragraphs 17, 19. Ms. Lazzari also offered late-discovered evidence that tended to establish that Ms. Szeto's allegations regarding a December 3, 2014 incident were false. Id. at 19.

The Court denied Ms. Lazzari's motion for reconsideration, finding that the petition had been based on more than the December 3, 2014 allegation. Id. In other words, the Court confirmed that it relied upon evidence offered by Ms. Szeto concerning claims that were supposed to have been fully and forever resolved by the Settlement Agreement of June 23, 2014. This in turn allowed Ms. Szeto to use the bases for her retaliatory counterclaims in order to publicly cast Ms. Lazzari in a negative light a second time via an anti-harassment order. CP 72-73; see also, generally, CP 18-71.

On May 27, 2015, Ms. Lazzari filed the present suit against Ms. Szeto alleging breach of contract and unjust enrichment based on the foregoing. CP 1-9. In response to a motion for default, Ms. Szeto ultimately answered the Complaint on July 9, 2015. CP 18. Ms. Szeto submitted a packet of materials in addition to her Answer, which included the aforementioned deposition excerpt, as well as declarations, photographs, and other items. CP 18-73.

On the same day Ms. Szeto filed her Answer, she also filed a motion to dismiss the lawsuit under CR 12(b). CP 10-17; see also CP 85-88. Ms. Szeto noted the motion for July 17, 2015. CP 89-90. In the body of her motion, Ms. Szeto referred frequently to the 52 pages of evidence in the form of sworn testimony, exhibits, and other materials to support her arguments. CP 10-17; see also CP 85-88. While she referred to the materials liberally, Ms. Szeto failed to cite directly to them. Id. This was presumably intended to justify the fact that the hearing was noted for a week after the motion was filed by making it appear to be a motion under CR 12(b).

Ms. Lazzari timely submitted an objection to Ms. Szeto's motion hearing being set on less than 28 days' notice as required under CR 12 and CR 56. CP 74-82; 83-84. Ms. Lazzari articulated that the motion was based on affidavits and other evidence that were presented to and not excluded by the Court, and that the motion should therefore be converted to a 28-day motion. Id. The fact that these materials were relied upon (despite the lack of citations) in the motion, combined with the actual prejudice to Ms. Lazzari (CP 83-84) resulting from the deprivation of sufficient time to rebut the evidence provided by Ms. Szeto, justified treating the motion as though it were filed under CR 56.

In addition, notwithstanding the lack of an opportunity to gather her own responsive evidence to Ms. Szeto's summary judgment motion, Ms. Lazzari

demonstrated in her opposition brief why Ms. Szeto's arguments of collateral estoppel and failure to state a claim upon which relief could be granted were fatally flawed. CP 74-82.

The Court declined to grant Ms. Lazzari's procedural objection. CP 89-90. Moreover, at the time of the hearing, the Court denied Ms. Lazzari the opportunity to be heard on anything but the objection before granting Ms. Szeto's motion to dismiss. RP 8, Line 7-RP 9, Line 16. It was only after the Court orally granted the motion that Ms. Lazzari was granted an opportunity to respond to the oral argument of Ms. Szeto. See RP 9, Line 17 to RP 12, Line 11. As could be expected, Ms. Lazzari's remarks on the merits of the motion did not change the predetermined outcome. RP 12, Lines 12-15; see also CP 89-90.

C. Summary of Argument

It was improper for the Court to refuse to convert Ms. Szeto's CR 12 motion into a CR 56 motion. By declining to continue the hearing over Ms. Lazzari's timely objection, the Court committed a prejudicial error that deprived Ms. Lazzari of the opportunity to rebut the specious evidence and testimony proffered by Ms. Szeto. Alternatively, the Court erred by failing to exclude the materials submitted outside of the pleadings, as it was required to do before considering the motion to be made under CR 12.

Under no circumstances should Ms. Szeto's motion have been granted, even under the procedural circumstances presented. The doctrine of collateral estoppel is inapplicable to the claims brought by Ms. Lazzari in this action. Moreover, Ms. Szeto's position that her actions did not violate the terms of the Settlement Agreement is unpersuasive in view of the plain language of the document.

D. Argument

Standard of Review

Whether the subject motion for dismissal was brought under CR 12 or CR 56, this Court may apply a de novo standard of review, thereby engaging in the same analysis of the pleadings and other materials as the trial court. *See, e.g.,* FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 175 Wn. App. 840, 865, 309 P.3d 555 (Div. 1, 2013) review granted sub nom. FutureSelect Portfolio Mgt., Inc. v. Tremont Grp. Holdings, Inc., 179 Wn. 2d 1008, 316 P.3d 495 (2014) and aff'd, 180 Wn. 2d 954, 331 P.3d 29 (2014) (regarding the de novo standard of review in reference to CR 12 motions to dismiss); *see also* Folsom v. Burger King, 135 Wn. 2d 658, 663, 958 P.2d 301 (1998) (regarding the de novo standard of review in reference to CR 56 motions for summary judgment).

Under a de novo standard of review, the burden of proof is on Ms. Szeto as the moving party to demonstrate why she is entitled to dismissal of the lawsuit. The exact burdens, while similar under CR 12 and CR 56, are phrased slightly differently. Under CR 12, dismissal is only proper where "[I]t appears beyond doubt that the [moving party] can prove no set of facts, consistent with the complaint, which would entitle [her] to relief. [The Court will] regard the plaintiffs allegations in the complaint as true, and consider hypothetical facts outside the record." FutureSelect Portfolio Mgmt., 175 Wn. App. at 865. Also, unlike with a CR 56 motion, the non-moving party in a CR 12 motion is entitled to rely on the pleadings and all favorable inferences therefrom. Id.

Meanwhile, under CR 56, Ms. Szeto is tasked to demonstrate that there is no genuine dispute as to any material fact, and that she is entitled to judgment as a matter of law. CR 56; see also Folsom, 135 Wn 2d. at 663. All facts presented, as well as all reasonable inferences to be taken therefrom, must be resolved against the moving party. Id.

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ISSUE NO. 1: If a party presents materials outside of the pleadings for consideration in the context of a motion to dismiss, and the trial court does not exclude them, should the motion be treated as a CR 56 motion for summary judgment? (Assignment of Error No. 1)

Ms. Szeto submitted materials outside the pleadings to the Court in moving to dismiss the subject lawsuit. Had Ms. Szeto properly backed up her alleged facts with citation to affidavits and/or other admissible evidence, it would have been clearer that the present motion, which was brought under CR 12, should have been noted properly per the terms of CR 56. As the language in CR 12(b) makes plain:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

CR 12(b). Ms. Szeto's attempt to disguise a CR 56 motion as a CR 12 motion is made more evident by the fact that she sought dismissal based on collateral estoppel. By definition, this necessitates reference to matters outside of the pleadings in the instant case.

When Ms. Szeto's attempt to short change Ms. Lazzari's response time to a summary judgment motion drew an objection, she doubled down by citing to the case of PE Systems, LLC v. CPI Corp., 176 Wn. 2d 198, 289 P. 3d 638 (2012). In particular, Ms. Szeto excerpted the following quote from the

decision: "While Washington does not specifically require instruments to be attached to pleadings, our rules permit them to be attached. We hold that a contract may be attached to a pleading, and that a contract so attached becomes part of the pleading." PE Systems, LLC, 176 Wn. 2d at 205. Having directly quoted the decision, Ms. Szeto was doubtless aware that the Court disagreed with the premise that she was using it for. In fact, on the same page of the decision (205), two paragraphs prior to the above-quoted language, the Supreme Court said this: "[E]xhibits that stretch the definition of a 'written instrument,' such as affidavits, are extrinsic evidence that may not be considered as part of the pleadings." Id.; citing Rose v. Bartle, 871 F.2d 331, 339 (n. 3) (3d Cir. 1989). The Court went on to reiterate its assent to this reasoning one sentence after the language Ms. Szeto quoted: "We agree with the Court of Appeals that merely attaching a document to a pleading does not necessarily make it admissible or establish that it may be otherwise considered as evidence." Id.

Despite her apparent knowledge that she could not attach affidavits, excerpts of deposition transcripts, photos, unsworn statements, and other dubious evidence to her Answer in order to skirt the requirements of CR 12 and CR 56, Ms. Szeto nonetheless refused to convert her motion to a 28-day motion. Needless to say, it was improper for Ms. Szeto to do this. It is

equally apparent that the Court was under an obligation to consider the motion as having been brought under CR 56, whether Ms. Szeto agreed or not.

The Court erred in refusing to treat Ms. Szeto's motion as a CR 56 motion. Ms. Lazzari demonstrated the actual prejudice that was done to her in being called to respond on the merits to a summary judgment motion filed with six days' notice. CP 83-84. The ruling must therefore be vacated and remanded to the trial court.

2. Was the doctrine of Collateral Estoppel inappropriately applied by the Court in determining that a claim (breach of contract) that was referenced but not decided upon in the context of a Petition for Anti-Harassment Order could not be brought in a subsequent action? (Assignment of Error No. 1)

Ms. Szeto maintains that Ms. Lazzari is collaterally estopped from bringing a breach/unjust enrichment action. This argument is premised on the fact that Ms. Lazzari argued to the Judge Pro Tempore who heard Ms. Szeto's anti-harassment petition that Ms. Szeto's primary reliance on settled and released claims was improper. The issue of whether Ms. Szeto's actions constituted actionable breach of the Settlement Agreement was never before the Court that decided the anti-harassment petition, however. The Judge Pro Tempore's decision to base issuance of the anti-harassment order on resolved claims required no finding that Ms. Szeto breached a contract in doing so. Indeed, no such finding was ever made. This is also obviously true with

regard to Ms. Lazzari's unjust enrichment claim. With these undisputed facts in mind, it is difficult to grasp how collateral estoppel could be invoked to preclude Ms. Lazzari from seeking relief in the subject lawsuit.

Collateral estoppel, otherwise known as "issue preclusion," prohibits the re-litigation of issues that have been previously decided as between the same parties to a subsequent action. See Reninger v. Dep't of Corr., 134 Wn.2d 437, 449, 951 P.2d 782 (1998). When applied in appropriate cases, [C]ollateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties." Hadley v. Maxwell, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) (quoting Reninger, 134 Wn.2d at 449, 951 P.2d 782). In order to determine whether an issue is barred from being re-litigated in a subsequent matter, the party asserting collateral estoppel must establish that it meets the following four criteria:

> (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied.

Clark v. Baines, 150 Wn. 2d 905, 913, 84 P.3d 245 (2004) (quoting State v. Harrison, 148 Wn2d 550, 561, 61 P.3d 1104 (2003).

The issue decided in an earlier proceeding was not identical to the issue presented in this matter. Ms. Szeto submitted no evidence in support of her motion that demonstrated her Petition for an Anti-Harassment Order, as well as the proceedings that followed, allowed for adjudication of whether she breached the terms of her Settlement Agreement by referencing claims that she agreed to dismiss with prejudice in exchange for money. One would normally expect that the only issue for consideration in a Petition for Anti-Harassment Order would be whether the statutory grounds for issuance of such an order have been met. Ms. Lazzari would have no opportunity in that forum to have adjudication on the issue of whether her Settlement Agreement was breached as has been alleged in this lawsuit. Ms. Szeto has offered no authority suggesting that an exception exists to her obligations under the Settlement Agreement and Release in the event that she seeks an Anti-Harassment Order. Consequently, Defendant's argument that this lawsuit should be dismissed because of collateral estoppel must fail.

The previous matter to which Ms. Szeto refers in asserting collateral estoppel also did not end in a judgment on the merits. No findings have been offered by Defendant that would support the notion that her Petition for Anti-Harassment Order ended in a judgment on the merits. Rather, it appears an Anti-Harassment Order was entered. As a form of injunctive relief, it is inherently not a final judgment on the merits.

Lastly, collateral estoppel cannot be applied in the event that application of the doctrine works an injustice on Ms. Lazzari. Ms. Szeto breached the terms of her Release as described in the Complaint by improperly bootstrapping released claims—which were resolved for nuisance value—to fabricated subsequent claims in an attempt to continue mudslinging. Ms. Szeto has made a habit of attempting to excuse her own boorish behavior by accusing Ms. Lazzari of bigotry whenever Ms. Lazzari has tried to defend herself against Ms. Szeto's repeated transgressions. It was her response to the original lawsuit Ms. Lazzari brought against her, and it has been recycled for effect because Ms. Szeto felt that it was of strategic use to her to rekindle her libelous accusations after Ms. Lazzari obtained an arbitration result against her that was unfavorable. To now claim that Ms. Lazzari cannot even pursue a breach of contract action where Ms. Szeto has so obviously violated the terms of a Release that bears her notarized signature—under the guise that the issue was somehow adjudicated before a Judge Pro Tempore in an anti-harassment petition—is misguided to say the least.

3. Was there any basis in the record for the Court's decision to dismiss Ms. Lazzari's claim for Unjust enrichment? (Assignment of Error No. 1)

Ms. Szeto sought dismissal of the entire underlying lawsuit, but ignored Ms. Lazzari's unjust enrichment claim in her briefing. No evidence or argument was ever offered to support dismissal of the unjust enrichment

claim as articulated in Ms. Lazzari's Amended Complaint (CP 1-9). As such, the Court committed clear error in dismissing the claim without any basis.

4. Did Ms. Lazzari state a claim upon which relief could be granted by alleging that Ms. Szeto breached the terms of the Settlement Agreement (and was unjustly enriched thereby), citing to the language of the Agreement that was breached, and identifying relevant factual allegations that established how the breach occurred? (Assignment of Error No. 1)

Ms. Szeto argues that the lawsuit fails to state a claim upon which relief can be granted. On the contrary, the Complaint states that the claims are breach of contract and unjust enrichment. The contract is attached to the Complaint, and the language in the Complaint makes the basis of the breach allegation plain. The only basis offered by Defendant Szeto for her argument that the Complaint fails to state a claim upon which relief can be granted is found in unsworn—and disingenuous—factual allegations that should never have been considered by the trial court in the context of a CR 12(b) motion to dismiss. The three sub-topics offered by Defendant related to failure to state a claim are addressed in turn below.

"Course of Conduct"

Defendant Szeto made the unfounded suggestion in her motion that she did not premise her Petition for Anti-Harassment Order on allegations that predated the Settlement Agreement. This flies in the face of evidence on record that demonstrates the clear opposite. Moreover, as detailed above in

the discussion concerning the standard of review, Ms. Szeto is not entitled to rely on disputed factual assertions and inferences that favor her. Ms. Lazzari is entitled to have all disputed factual allegations, and the reasonable inferences to be drawn therefrom, decided in her favor. Further, in the context of this CR 12(b) motion, all of the assertions in Ms. Lazzari's Amended Complaint are to be taken as true. With that in mind, Ms. Szeto took a nuisance value settlement (CP 2, Paragraph 8) in exchange for her abandonment of frivolous retaliatory counterclaims (CP 2, Paragraph 7, to CP 3, Paragraph 10), got upset when the original lawsuit was not going her way (CP 3, Paragraph 11), and decided to try to bully Ms. Lazzari once again with unsupportable allegations of racism (Id. at Paragraphs 13-14). In an attempt to cloak her new frivolous accusations in the mantle of legitimacy, she claimed that an incident took place on December 3, 2014. Not having any evidence to support her allegation, she opted to enhanced her story with recycled frivolous claims that she was making before she accepted nuisance value to release and forever abandon them. Defendant Szeto calls this a "course of conduct." It is more accurately described as a breach of contract that is as clear as it is material.

It is particularly nefarious for Ms. Szeto to argue now that she did not intend to premise her petition on the settled claims, because by suggesting that she filed suit and received a settlement, she was clearly seeking to create

an inference that her previous claims were legitimate. They were not, and she accepted a pittance to walk away from them rather than end up getting nothing in a trial.

Were the underlying motion not improperly treated as a CR 12(b) motion to dismiss, Ms. Lazzari would have been afforded more than three business days to procure additional affidavits and evidence establishing the above, and would certainly have more than the pleadings to refer to. Ms. Szeto may well have been relying on this. There can be no question, however, that Ms. Szeto is not entitled to the benefit of bare factual allegations unsupported by evidence and noted for consideration under CR 12(b).

"The Petition for Anti-Harassment Order is not a 'claim'"

Ms. Szeto argued that the Petition for Anti-Harassment Order was not a "claim," as that term is defined by Black's Law Dictionary. In doing so, she conspicuously ignored how the term "claim" is defined within the Settlement Agreement itself. As a term of art with a definition that is spelled out in the instrument itself, the only definition that may be properly considered is the one the parties agreed to at the time Ms. Szeto added her signature to it and cashed her check:

> Washington follows the "objective manifestation theory of contracts" to determine the parties' intent. Courts focus on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. When interpreting contracts, the subjective intent of the parties is generally irrelevant

> if the intent can be determined from the actual words used. This court does not interpret what was intended to be written but what was written.

Washington Fed. v. Gentry, 179 Wn. App. 470, 490, 319 P.3d 823, 833 (Div. 1, 2014); review granted sub nom. Washington Fed. v. Gentry, 180 Wn. 2d 1021, 328 P.3d 902 (2014) and aff'd sub nom. Washington Fed. v. Harvey, 182 Wn. 2d 335, 340 P.3d 846 (2015). As established above, and as is typical, the Settlement Agreement contained an expansive description of the term "Claim," to include the following definition:

> All claims, known or unknown, that were brought or could have been brought by Ms. Szeto against Ms. Lazzari up until the date of execution of the agreement by virtue of any act, omission or occurrence. 'Claims' also includes any other legal, equitable, statutory or common law disputes that in any way relate to the allegations in the counter claim.

Under the objective manifestation theory of contracts, "It is the duty of the court to declare the meaning of what is written, and not what was intended to be written." Condon v. Condon, 177 Wn. 2d 150, 162, 298 P.3d 86 (2013) (quoting J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 349, 147 P.2d 310 (1944)). Whether Ms. Szeto, despite the language in the Settlement Agreement and the advice of her legal counsel, honestly believed that she was only releasing her claims as defined in Black's Law Dictionary is immaterial. She reviewed and signed the Agreement with the assistance of a

lawyer, and she accepted the money that was offered in exchange. She must therefore be bound to the actual language of the document.

"Plaintiff cannot use the settlement agreement as a shield"

Ms. Szeto argued in her motion that Ms. Lazzari was improperly attempting to shield herself with the Settlement Agreement. Any settlement agreement's utility lies in its effectiveness as a shield against future claims based—in whole or in part—on the facts or circumstances alleged in the claims resolved thereby. Ms. Szeto argued that this unfairly restricted her access to most of the frivolous assertions she made prior to accepting a nuisance value settlement, because it weakened her credibility in advancing new frivolous assertions. While this may seem unfair to Ms. Szeto, it is exactly what she agreed to.

5. Since the Court refused to allow Plaintiff/Appellant Lazzari the time to respond under CR 56—despite evidence that the denial of due process actually prejudiced Plaintiff/Appellant in her ability to prepare and present affidavits and other evidence of her own to rebut the evidence proffered by Defendant/Respondent Szeto—should the Court have excluded the affidavits and evidence offered by Defendant/Respondent Szeto in her motion to dismiss? (Assignment of Error No. 2)

This final issue, which is the only issue pertaining to Ms. Lazzari's Second Assignment of Error, is essentially the flip side argument regarding the trial court's erroneous consideration of Ms. Szeto's motion under CR 12. Because the Court refused to allow Ms. Lazzari to present evidence and affidavits in

response to Ms. Szeto's motion, the only way the hearing could properly have proceeded would have been following the trial court's exclusion of all materials offered outside of the pleadings. The trial court did not do this; in fact, the trial court judge's remarks at the time of the hearing suggest that those materials were not only considered, but central to the decision that was rendered. See, e.g., RP 9, Lines 1-3; RP 12, Lines 12-15.

Ms. Lazzari assigns error to the trial court's decision to rely on evidence submitted outside of the pleadings in the context of a CR 12(b) motion.

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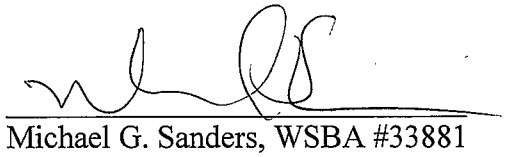
E. Conclusion

Procedurally and substantively, the trial court committed reversible error that caused actual prejudice to Ms. Lazzari. Ms. Lazzari hereby requests that the trial court's order dismissing this case be vacated, and that the matter be remanded to Pierce County Superior Court with instructions to strike everything attached to Ms. Szeto's Answer from the case record, and to issue a new case schedule.

Ms. Lazzari also requests an award of her reasonable attorney's fees and costs in the event that this Court determines she is the substantially prevailing party in this appeal. This request is made pursuant to Title 14 of the Rules of Appellate Procedure, as well as under the terms of the Settlement Agreement.

Respectfully submitted this 6th day of November, 2015.

MIX SANDERS THOMPSON, PLLC



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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

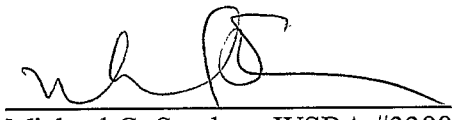
SHAWNEE K. LAZZARI, Appellant, v. FREDIA DELORES SZETO, Respondent.	No. 47924-9-II **CERTIFICATE OF SERVICE**

TO: CLERK OF THE COURT OF APPEALS, DIVISION II; and
TO: ALL COUNSEL.

I, MICHAEL G. SANDERS, declare under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, I am over the age of eighteen years old I am not a party to this matter. I further declare that on this 6th day of November, I caused a copy of the Brief of Appellant in this action to be served via hand delivery on the following:

Court of Appeals, Division Two 950 Broadway, Suite 300 Tacoma, WA 98402
Russell A. Knight Attorney for Respondent 1501 Dock Street Tacoma WA 98402

Executed at Tacoma, Pierce County, Washington this 6th day of November, 2015.



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